

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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KISHA NORMAN,

Plaintiff,

v.

CLARK COUNTY DEPARTMENT OF
 JUVENILE JUSTICE SERVICES,

Defendant.

Case No. 2:14-cv-01622-APG-GWF

**ORDER GRANTING THE
 DEFENDANT'S MOTION FOR
 SUMMARY JUDGMENT**

(ECF No. 38)

Plaintiff Kisha Norman was a part-time hourly employee at the juvenile detention facility operated by defendant Clark County Department of Juvenile Justice Services (DJJS). Norman was at the facility during a melee in the dining hall during which she claims to have observed two white probation officers use excessive force on an African-American juvenile. Norman asserts that as the incident was occurring, she stated "that's excessive force" and the officers heard her statement. She contends she was fired the next day in retaliation for her report of excessive force motivated by racial animus. She brings claims against DJJS for retaliation under 42 U.S.C. § 1981 and Title VII.

DJJS moves for summary judgment. I grant DJJS's motion because Norman has not shown a genuine dispute about causation. Specifically, Norman has not presented evidence that the decision maker was aware of her report of excessive force at the time he made the decision to terminate her employment at the detention facility. She also has not raised a genuine dispute that subordinate employees with a retaliatory motive influenced or participated in the decision making process that resulted in her termination.

I. BACKGROUND

Norman worked as an on-call, part-time juvenile services assistant with DJJS starting in March 2012. ECF No. 38-1 at 13, 67, 78. As such, she was scheduled to work as needed during times when other staff at the juvenile detention center were on vacation or had other scheduled

1 time off. ECF No. 56 at 7. Her duties included providing direction to the juveniles, supervising
2 them, conducting health and welfare checks, and other duties as assigned. *Id.*

3 According to Norman, between her date of hire and the date of the incident preceding her
4 termination, no one ever told her that her job performance fell below the expected standards. ECF
5 Nos. 38-1 at 84; 56 at 17. Rather, Norman states, her supervisors praised her for her efforts. ECF
6 No. 56 at 17. However, there were some instances where probation officers complained about
7 Norman's behavior, including that she littered out of county-marked cars, that she represented
8 dirty laundry as clean, and that she did not properly conduct health and welfare checks. ECF Nos.
9 38-1 at 139, 148, 152; 38-2 at 5.

10 The brawl in the dining hall took place on March 12, 2013. ECF No. 38-1 at 96. Earlier
11 that day, probation officer David Carlisle complained to Carolyn Banks, one of the probation
12 supervisors, that he did not want to work with Norman any longer because she did not interact
13 with or direct the juveniles, she was "just a body," and he did not think she would "back up the
14 staff." *Id.* at 143, 190. Carlisle was concerned because he believed tensions were running high
15 among the juveniles in his unit. *Id.* at 186. In response to Carlisle's concerns, Banks assigned two
16 other employees to assist with Carlisle's unit during the dinner service. ECF Nos. 38-1 at 143,
17 186, 190, 204; 38-2 at 9.

18 Later that day, a fight broke out in the dining hall after one of the juveniles threw his tray
19 of food at another juvenile and a probation officer. ECF Nos. 38-1 at 98, 100, 103; 38-2 at 54.¹
20 Probation officers deployed pepper spray and yelled for the juveniles to get on the floor. ECF No.
21 38-1 at 97. Some of the juveniles complied but others continued fighting. *Id.* at 100, 104.
22 Norman had her back against the wall looking out into the dining hall. *Id.* at 98. According to
23 Norman, probation officer Jaqueline Alvarado told Norman to stay where she was and to keep the
24 boys down on the floor. *Id.* at 100, 106. This was consistent with training for part-time hourly
25 employees who were told that if violence breaks out, they should not intervene and should stay
26 out of the way. *Id.* at 187. According to Alvarado, she told Norman to "do something," although

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28 ¹ See also exhibit S to DJJS's summary judgment motion for a video of the incident.

1 she provided no guidance about what she expected Norman to do. *Id.* at 209, 218. Lisa Johnson,
2 the other part-time employee present during the fight, was directing the juveniles near her to
3 remain on the ground. *Id.* at 211; ECF No. 38-2 at 9-10.

4 One of the boys involved in the initial altercation, Harper, was lying on the floor on his
5 stomach. ECF No. 38-1 at 107. Two probation officers, Dana DeHesa and Alvarado, handcuffed
6 Harper but Harper started squirming on the floor. *Id.* at 107-08, 110; ECF No. 38-2 at 68. Two
7 other probation officers, Damian Storla and Philip DiCalegero (who are both white), came over to
8 assist. ECF No. 38-2 at 76. Storla and DiCalegero got Harper to his feet, but shortly thereafter
9 took him to the ground again after Harper spit on DiCalegero. ECF No. 38-1 at 110, 111, 216.

10 At this point, the stories diverge. According to Norman, one of the white probation
11 officers then struck Harper multiple times in the head and the other put his knee in Harper's back
12 and struck Harper several times in the back. *Id.* at 107, 111, 113; ECF No. 56 at 20. The two
13 white male probation officers are Storla (in the green shirt in the video) and DiCalegero (in the
14 red shirt in the video). Norman claims she stated "that's excessive force" loud enough for the
15 officers to hear her. ECF No. 38-1 at 113. Norman claims that the officers looked up at her, said
16 something to each other, and stopped hitting Harper. *Id.*; ECF No. 56 at 20-21. Then one of them
17 told her to "get back." ECF No. 56 at 21. According to Norman, the video of the incident does
18 not show the excessive force because of the angle of the video, but she was in a direct line of
19 sight, with no obstruction. *Id.* All of the officers involved in controlling the scene in the dining
20 hall (including Storla and DiCalegero) deny that they used excessive force, that they observed the
21 use of excessive force by other officers, or that they heard Norman mention excessive force. ECF
22 Nos. 38-2 at 69, 73, 76-77, 83-84; 42 at 2-3; 49; 50 at 3.

23 After relative order was restored but while some juveniles were still lying unrestrained on
24 the dining hall floor, Norman walked over to a door to let in fresh air. ECF Nos. 38-1 at 114-15;
25 38-2 at 10. Eventually the boys were lined up and returned to their unit. ECF No. 38-1 at 116.
26 According to Banks, other employees were attempting to control the situation and providing aid
27 to the youths who were suffering the aftereffects of the pepper spray except Norman, who was in
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1 the control room eating her lunch. ECF Nos. 38-2 at 128; 41 at 2. Norman, however, avers that
2 she assisted in walking the juveniles back to their rooms. ECF No. 56 at 22.

3 The standard operating procedures for part-time staff include a requirement that any child
4 abuse allegations must be reported immediately to the child abuse hotline. ECF No. 38-1 at 19.
5 Norman did not fill out a report about the incident that day. *Id.* at 119. According to Norman, she
6 asked if she could fill out a report but probation officer Carlisle told her she could not because
7 part-time employees do not fill out reports. *Id.* at 116; ECF No. 56 at 21. Norman also asserts
8 that nearly all the probation officers went to watch the video of the incident before filling out their
9 incident reports. ECF No. 38-1 at 116.

10 The next day, Patrick Schreiber, then-assistant director for DJJS, attended a regularly-
11 scheduled supervisors' meeting. *Id.* at 158. As normally happened at other supervisors' meetings,
12 the discussion turned to the performance of part-time hourly employees. *Id.* at 159. During that
13 discussion, one of the supervisors raised the issue that Norman did not assist during the dining
14 hall incident. *Id.*; ECF No. 38-2 at 120, 151, 167. Several of the supervisors (including Banks,
15 Donald McLeod, and Marcus McAnally) expressed that they were not interested in having
16 Norman work on their shifts or in their units due to safety and security concerns. ECF Nos. 38-1
17 at 158; 38-2 at 129, 150-51; 41 at 3. According to Schreiber, this was the "expressed consensus
18 from a number of supervisors" ECF No. 38-1 at 158. None of the supervisors volunteered to
19 take Norman despite the regular need for personnel because the supervisors believed she would
20 not respond appropriately in emergencies and she had to be told what to do. *Id.* Schreiber also
21 heard, for the first time, various other complaints about Norman's performance, including that she
22 did not seem motivated, did not interact well with the juveniles, and tended to be in the control
23 room or office instead of interacting with the youth. *Id.* at 159-60. No one told Schreiber that
24 Norman had stated two white officers had used excessive force on an African-American juvenile.
25 ECF No. 38-2 at 153.

26 That same day, Schreiber sent an email to Sergio Alvarez-Serna, the timekeeper, stating
27 that supervisors had advised Schreiber that Norman was "not working out well and should not be
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1 used in the future.” ECF Nos. 38-1 at 144; 38-2 at 163. Alvarez-Serna responded the next day,
2 asking Schreiber to “[l]et me know when I can send the termination letter.” *Id.* According to
3 Schreiber, his decision to terminate Norman was based on what others said to him about her work
4 performance. ECF No. 38-2 at 141. He denies that his decision to terminate her had anything to
5 do with race or her concerns about excessive force. ECF No. 38-1 at 161.

6 When Norman was not called back in to work, she called to ask if she would be needed.
7 ECF No. 56 at 23. She was told that her services were not needed that day. *Id.* She called again
8 on March 25 and was told she was marked as “not available.” *Id.* Norman responded that she was
9 always available and she was told she should talk to DJJS administration. *Id.* That same day,
10 Norman spoke to Alvarez-Serna. *Id.* He suggested that Norman fill out another availability sheet,
11 which she did. *Id.* She also spoke with then-manager of DJJS, Mark Humphries. *Id.* Humphries
12 did not tell Norman she had done anything wrong. *Id.* Instead, he said he would call her back but
13 he did not. *Id.* Norman’s further efforts to contact Humphries were unsuccessful. *Id.* at 23-24.

14 On March 26, Norman was called in to work but not at the detention facility. *Id.* at 24.
15 The probation officer on duty told Norman she was no longer on the roster for the detention
16 facility and sent her to booking, where she worked for the rest of that day. *Id.*

17 Although Humphries had not responded to Norman, he sent an email to Schreiber and the
18 probation supervisors stating that Norman had called and would like more information about her
19 performance issues. ECF No. 38-1 at 141. Probation supervisor Goetz responded, stating that she
20 thought Norman was “a poor worker, with no safety and security mindset.” *Id.* Goetz also
21 indicated there was “some concern about [Norman’s] ability to perform the duties of the job after
22 the fight in the dining hall with unit E2.” *Id.* Upon receiving this email, Humphries thanked
23 Goetz and stated “this helps.” *Id.*

24 On March 29, Norman wrote a letter to Humphries and Schreiber. *Id.* at 120; ECF No. 38-
25 2 at 34. In that letter, Norman gave her version of the dining hall incident, including that two
26 officers hit Harper on his back and head. ECF No. 38-2 at 35. Her letter did not mention the race
27 of the officers or the detainee.
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1 On April 4, Schreiber sent a letter to Norman indicating she would no longer be working
2 for DJJS. *Id.* at 122; ECF No. 38-2 at 172. Norman called Schreiber stating she was going to
3 report excessive force during the dining hall incident. ECF No. 38-1 at 160. According to
4 Schreiber, this was the first time he heard anything about excessive force being used during the
5 incident even though he was an addressee on Norman's March 29 letter. *Id.* at 160-61. Schreiber
6 told Norman that the video from the incident was preserved and that the matter was being
7 reviewed. *Id.* at 160.

8 That same day, Schreiber sent an email to the probation supervisors stating that he had
9 spoken to Norman about her services no longer being needed. *Id.* at 147. Schreiber stated that
10 although he had received verbal comments previously about Norman's performance, he needed
11 emails from the supervisors because Norman stated she had been called regularly, was
12 complimented on her work, and would be making an Equal Employment Opportunity
13 Commission (EEOC) complaint. *Id.* Banks then emailed some of her employees asking them to
14 email her with "any work interactions you had with this employee in which you felt her work
15 performance was not sufficient." *Id.* at 149.

16 Banks responded to Schreiber's email by documenting various issues with Norman,
17 including that Norman did not want to work in the girls' unit, did nothing to supervise the
18 juveniles during the dining hall incident, did not assist in walking the juveniles back, and then
19 went to the control room to eat. *Id.* at 143. Probation supervisor McAnally wrote that Norman
20 was "more concerned about eating during her shift than supervising youth." *Id.* at 147. McAnally
21 also stated that he thought Norman "showed zero initiative." *Id.* Probation officer Jacqueline
22 Gonzales stated that Norman did not physically conduct health and welfare checks, once tried to
23 pass off dirty laundry as clean, and took an excessive amount of time to return dinner trays to the
24 kitchen. *Id.* at 148, 175. Probation officer Rebeca Alvarez stated that Norman would not interact
25 with the youths and would not voluntarily secure the youths in their cells unless directed. *Id.* at
26 150, 175.

At some point after Norman's termination, Norman called Banks and asked for the names of the two white officers who she claims used excessive force on Harper. *Id.* at 190. Banks responded that she was not aware of two white officers who used excessive force on a juvenile. *Id.* at 191.

On April 9, Norman sent a letter to the EEOC. *Id.* at 122-23. On August 5, she filed an EEOC complaint. *Id.* at 121. The EEOC issued her a right to sue letter. ECF No. 13 at 1. Norman then filed this lawsuit against DJJS alleging retaliation under 42 U.S.C. § 1981 and Title VII.²

II. ANALYSIS

Summary judgment is appropriate if the pleadings, discovery responses, and affidavits demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I view the evidence and reasonable inferences in the light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

Title VII prohibits retaliation by making it unlawful "for an employer to discriminate against any of [its] employees or applicants for employment . . . because [she] has opposed any practice made an unlawful employment practice by this subchapter" 42 U.S.C. § 2000e3(a).

² Schreiber initially was a defendant in this action but was dismissed pursuant to the parties' stipulation. See ECF Nos. 1, 25. Additionally, Norman asserted a First Amendment claim but she stipulated to dismiss it. *Id.*

1 Section 1981 also encompasses employment retaliation claims. *CBOCS West, Inc. v. Humphries*,
2 553 U.S. 442, 445 (2008). The legal principles governing a section 1981 retaliation claim and a
3 Title VII retaliation claim are the same. *Manatt v. Bank of Am., NA*, 339 F.3d 792, 797 (9th Cir.
4 2008).

5 To make out a prima facie case of retaliation under Title VII, the plaintiff must establish
6 that: “(1) she engaged in a protected activity, such as the filing of a complaint alleging racial
7 discrimination, (2) the [employer] subjected her to an adverse employment action, and (3) a
8 causal link exists between the protected activity and the adverse action.” *Id.* at 800 (quotation
9 omitted). If the plaintiff establishes a prima facie retaliation claim, the burden shifts to the
10 employer “to articulate a legitimate, non-discriminatory reason for the adverse employment
11 action.” *Id.* If the defendant does so, then the plaintiff “bears the ultimate burden of
12 demonstrating that the reason was merely a pretext for a discriminatory motive.” *Id.* (quotation
13 omitted).

14 “The causal link can be inferred from circumstantial evidence such as the employer’s
15 knowledge of the protected activities and the proximity in time between the protected activity and
16 the adverse action.” *Dawson v. Entek Int’l*, 630 F.3d 928, 936 (9th Cir. 2011); *see also Raad v.*
17 *Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (“[T]he plaintiff must
18 make some showing sufficient for a reasonable trier of fact to infer that the defendant was aware
19 that the plaintiff had engaged in protected activity.”). Additionally, under the “cat’s paw
20 metaphor,” even if the final decision maker lacked retaliatory intent, the plaintiff can establish the
21 causal link by “proving that [a] biased subordinate influenced or was involved in the decision or
22 decision making process.” *France v. Johnson*, 795 F.3d 1170, 1176 (9th Cir. 2015), *as amended*
23 *on reh’g* (Oct. 14, 2015) (quotation omitted).

24 Schreiber decided to terminate Norman’s services at the detention facility the day after the
25 dining hall incident based on the supervisors’ comments at the March 13 meeting. There is no
26 evidence that before he made this decision, anyone told him that Norman had made a claim of
27 excessive force, much less that her claim included an assertion that the excessive force was
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1 motivated by racial animus. Her retaliation claims thus lack the essential causal link between her
2 alleged protected activity and her termination.

3 There also is no evidence from which a reasonable fact finder could infer that the
4 probation officers who heard Norman state “that’s excessive force” influenced or were involved
5 in the decision making process that resulted in Norman’s termination under a cat’s paw theory.
6 There is no evidence that Storla, DiCalegero, or any other probation officer within hearing
7 distance told anyone that they heard Norman make a claim of excessive force or that they
8 understood there was a racial component to this allegation. There is no evidence Storla or
9 DiCalegero complained to a supervisor about Norman’s performance with the intent to have her
10 fired or otherwise initiated the conversation about Norman’s performance at the regularly
11 scheduled supervisors’ meeting. They are not supervisors and there is no evidence they attended
12 that meeting. Instead, Norman’s performance was raised as part of the normal discussion on part-
13 time hourly employees. Multiple supervisors at the meeting expressed concerns about Norman’s
14 performance on a variety of issues and no supervisor volunteered to use Norman in his or her
15 unit. There is no evidentiary basis for a reasonable jury to conclude that Storla, DiCalegero, or
16 other probation officers with a retaliatory intent influenced (1) multiple supervisors to speak out
17 about Norman’s performance issues and (2) every supervisor to decline to accept Norman in their
18 unit. *Compare Poland v. Chertoff*, 494 F.3d 1174, 1183-84 (9th Cir. 2007) (employee’s
19 retaliatory intent imputed to employer where that employee initiated the administrative inquiry,
20 submitted a lengthy memo outlining various acts of malfeasance, provided the names of witnesses
21 for the inquiry panel to contact, and provided the panel with another employee’s notes on the
22 plaintiff’s performance); *Gilbrook v. City of Westminster*, 177 F.3d 839, 857 (9th Cir. 1999), *as*
23 *amended on denial of reh’g* (July 15, 1999) (retaliatory bias of employees not absolved by
24 neutrality of final decision maker where one employee spearheaded the investigation, kept others
25 apprised in closed-door meetings, and prepared the notice of discharge; and the other employee
26 served as a hearing officer after attending the closed-door meetings and met with the first
27 employee to discuss the notice of discharge). Thus, unlike other cat’s paw cases, there is no
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1 evidence Storla, DiCalegero, or other probation officers who may have had a retaliatory intent
2 initiated the conversation about Norman's performance at the supervisors' meeting or played a
3 role in the decision making process that resulted in her termination.

4 Norman relies on the complaint by Carlisle that Norman would not have probation
5 officers' backs as evidence that Carlisle meant Norman was willing to call out probation officers
6 for excessive force. However, Carlisle made this complaint before the dining hall incident, as
7 evidenced by Banks assigning two additional employees to Carlisle's unit for the dinner service
8 in response to his concerns. Thus, Carlisle could not have been referring to Norman's willingness
9 to oppose the use of excessive force.

10 Norman also relies on statements from other DJJS employees who generally discuss the
11 culture at DJJS as racially biased, abusive, and hostile to employees who report excessive force
12 by a probation officer. ECF Nos. 60 at 42-43, 45-46; 61 at 32-34, 39, 49, 51-52, 58, 60; 62 at 47;
13 63 at 6. Two of these employees also state that they heard through the rumor mill that Norman
14 had complained about excessive force and then was fired. ECF No. 61 at 30-31; 62 at 46.
15 However, these employees did not identify when and from whom they heard that Norman was
16 fired for reporting excessive force. Additionally, one of these employees previously had reported
17 a probation officer for using excessive force and was not fired or otherwise retaliated against for
18 doing so. ECF No. 63 at 19-20.

19 It is conceivably possible that the probation officers and their supervisors closed ranks and
20 retaliated against Norman for opposing excessive force. But Norman relies on speculation,
21 rumor, and innuendo. She does not present evidence raising "a reasonable inference that it did in
22 fact occur." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir.
23 2011). I therefore grant DJJS's summary judgment motion.

24 **III. CONCLUSION**

25 IT IS THEREFORE ORDERED that defendant Clark County Department of Juvenile
26 Justice Services' motion for summary judgment (**ECF No. 38**) is **GRANTED**. The clerk of court
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1 is instructed to enter judgment in favor of defendant Clark County Department of Juvenile Justice
2 Services and against plaintiff Kisha Norman.

3 DATED this 24th day of March, 2017.

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6 ANDREW P. GORDON
7 UNITED STATES DISTRICT JUDGE
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